IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 815 of 1993

with

CRIMINAL MISC.APPLICATION No 7862 of 2000
with
Criminal Misc. Application No.822 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GOVINDBHAI S KOLI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 815 of 1993
MR SUNIL C PATEL for the appellants
Mr. K.T. Dave, APP for Respondent No. 1

2. Criminal Misc.Application No. 7862 of 2000
THROUGH JAIL for Petitioner No. 1
Mr. K.T. Dave, APP for Respondent No. 1

3. Criminal Misc.Application No. 822 of 2002
THROUGH JAIL for Petitioner No. 1
Mr. K.T. Dave, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 19/06/2003

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. Criminal Appeal No.815 of 1993 is filed by the original accused (appellants), who are father-in-law, husband, mother-in-law, and sister-in-law of the deceased Rekhaben, challenging the judgment and order dated June 29, 1993 passed by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No.60 of 1993 by which all the appellants were convicted for the offences punishable under Section 302 read with Section 34 and under Section 302 read with Section 114 of the Indian Penal Code ('IPC' for short), and were sentenced to undergo R.I. for life. However, all the appellants were acquitted for the offences punishable under Section 498A of the IPC by the learned Additional Sessions Judge.

2. Criminal Misc. Application No. 7862 of 2000 and Criminal Misc. Application No. 822 of 200 were filed by the appellant No.2 for bail during pendency of Criminal Appeal No.815 of 1993, which were ordered to be heard along with the appeal. By the consent of the learned counsel appearing for the parties in the appeal as well as the applications, the same are disposed of by this common judgment.

3. Deceased Rekhaben, daughter of P.W.3, Bhimjibhai Jasmatbhai, was married to the appellant No.2, Maganbhai Govindbhai Koli on March 9, 1992. The appellant No.2 along with his father, mother [the appellants Nos.1 and 3] and sister [the appellant No.4] was residing in village Luvar Vav, Taluka Palitana, District Bhavnagar. The record indicates that the marriage life of Rekhaben and the appellant No.2 was not smooth due to the harassment meted out to the deceased Rekhaben who often used to go to her parents residing at village Valukad, Taluka Palitana. Whenever the deceased had visited her parents' house, she had, often, complained to her mother about the harassment caused to her by her in-laws and husband. On one occasion, the brother of the appellant

No.2, Vashrambhai, had gone to call Rekhaben when she had gone to her parents' house. Vashrambhai had given an assurance that, in future, Rekhaben would not be harassed and they would make her happy. As the harassment did not stop, Rekhaben had again gone to her parents' house. After 7-8 days of returning of Rekhaben to her parents' house, Vashrambhai accompanied by Monabhai, Sarpanch of Luvar Vav, had come to the house of the parents of Rekhaben and had requested them to send Rekhaben to her matrimonial home. Vashrambhai and Monabhai had again given an assurance to the parents of Rekhaben that, in future, Rekhaben would not be harassed. On the above assurance, Rekhaben was sent to the matrimonial home.

4. It is the prosecution case that, after the return of Rekhaben to her matrimonial home, on the next day, Vashrambhai came to the house of P.W.3, Bhimjibhai, at Valukad and informed the parents of Rekhaben that Rekhaben had poured kerosene on her. P.W.3, Bhimjibhai on hearing the news, accompanied by his wife and mother, went to the matrimonial home of Rekhaben at village Luvar Vav. On reaching the house of Rekhaben, they found that she was laid to sleep outside the house having sustained burn injuries. When the parents of the deceased reached the house of the appellants, they had found that Rekhaben was alive. They had asked Rekhaben why she had done this and Rekhaben immediately replied that she had not done this but it was the act of her in-laws. Rekhaben had, in detail, narrated to her mother how the incident had taken place. Thereafter, Rekhaben was taken to Palitana Hospital in a three-wheeler tempo. During the journey and at the time when the deceased was admitted in the hospital, she was conscious and in a fit state of mind. P.W.10, Medical Officer, Kalpesh B. Shah, of Mansinhji Hospital, Palitana, examined Rekhaben around 7.40 p.m. Rekhaben had given history at the time of admission in the hospital that she was set on fire by her in-laws; that the mother-in-law and the sister-in-law had caught hold of her and the father-in-law and the husband had poured kerosene and set her ablaze. This history narrated by Rekhaben herself was entered in the case papers Exh.39. P.W.1, Dr. Shah, had immediately conveyed the information to Palitana Police Station. On receiving the information from Palitana Hospital, P.W.14, PSI, Maru, had rushed to the hospital and had recorded the complaint of Rekhaben. After recording the complaint, an endorsement of P.W.1, Dr. Shah, was obtained that the patient was conscious. The said endorsement was made at 20.35 hrs. P.W.14, PSI, Maru, had sent yadi to the Executive Magistrate, Palitana Town, to record dying declaration of Rekhaben who was admitted

in Mansinhji Hospital, Palitana, and who was in serious condition. The said yadi was received by P.W.2, A.S. Makwana, Executive Magistrate, at 18.15 hrs. P.W.2, A.S. Makwana, on receipt of the yadi, had immediately rushed to Mansinhji Hospital and contacted the Doctor on duty to find out whether the patient was conscious and in a fit state of mind so that he can record her dying declaration. When the Doctor on duty, namely, P.W.1, Dr. K.B. Shah, had certified that the patient, Rekhaben, was conscious and in a fit state of mind, P.W.2, A.S. Makwana, Executive Magistrate, had started recording of dying declaration at 20.45 hrs which was completed at 20.55 hrs. After recording the dying declaration, P.W.2, A.S. Makwana, Executive Magistrate, had again obtained endorsement of P.W.1, Dr. K.B.Shah, at 8.55 p.m. (20.55 hrs) to the effect that the patient, Rekhaben, was conscious and in a fit state of mind. In the said dying declaration recorded by P.W.2, A.S. Makwana, Executive Magistrate, the deceased had stated that she was set on fire by her husband, mother-in-law, father-in-law and sister-in-law. She had narrated how the incident had taken place. She had stated that her husband had poured kerosene from a primus on her body and set her ablaze. It is further stated that, after setting her on fire, all the four persons had closed the door and went out of the house.

5. The complaint recorded by P.W.14, PSI, Maru, was sent to Palitana Police Station for registering offence against the appellants. The said complaint was registered at C.R. No.I-287 of 1992 of Palitana Police Station against the appellants for the offences punishable under Sections 307, 498-A and 34 of the IPC. The investigation of the above crime was handed over to Second PSI, M.G.Rabari. As the condition of Rekhaben was critical and, as adequate facilities were not available at Palitana Hospital to treat serious nature of burn cases, Rekhaben was removed to Sir Takhatsinh Hospital, at Bhavnagar. On reaching the hospital at Bhavnagar, the Doctor who had examined Rekhaben, had declared her dead around 22.05 hrs on December 18, 1992. An inquest was held on the dead body of Rekhaben and it was sent for post-mortem. P.W.1, Dr. K.J. Mishra, had performed post-mortem at 1 a.m. on December 19, 1992. After the death of Rekhaben, offence punishable under Section 302 of the IPC was added in CR No.I-287 of 1992. PSI, Rabari, had visited the scene of incident which was the house of the appellants on the night of 18th December 1992. He had found that the place of incident was cleaned and, therefore, he had called the Officers of the Forensic Science Laboratory ('FSL' for short), Bhavnagar.

PSI, Rabari, had recorded statement of one Jivanbhai and other persons residing in the neighbourhood. On December 19, 1992 around 1.15 a.m. he arrested the appellants Nos. 1 and 2 under an arrest panchanama. PSI, Rabari, had gone to village Valukad and recorded statements of the parents of the deceased Rekhaben. PSI, Rabari, had also collected blood samples of the appellants Nos. 1 and 2. On arrival of the officers of the FSL, panchanama of scene of offence was drawn by PSI, Rabari. On December 19, 1992, incriminating articles including control earth and cow dung which was laid in the room soiled with kerosene were seized under a panchanama. The appellants Nos. 3 and 4 were arrested around 15.15 hrs on December 19, 1992. Their clothes and nails of hands were collected in the presence of the officer of the FSL. Further investigation of the CR No.I-27 of 1992 was, thereafter, handed over to Deputy Superintendent of Police, Mr. S.M. Katara. P.W.15, Dy.SP, Mr. Katara, had recorded statements of Madhabhai Bharwad and Mana Meru Koli. The incriminating articles, which were seized during the investigation, were sent to the FSL, at Junagadh, for analysis.

6. On completion of the investigation, and on receipt of the report of the FSL as well as post-mortem notes and other medical case papers, chargesheet against the appellants was filed in the Court of the Judicial Magistrate, First Class, Palitana, for the offences punishable under Sections 302, 34, 498A, 201 read with 114 of the IPC, which came to be registered as Criminal Case No.200 of 1993. As the offence under Section 302 of the IPC is exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Palitana, had committed the case to the Court of Sessions, at Bhavnagar, where it came to be numbered as Sessions Case No.60 of 1993.

7. Charge Exh.3 was framed against the appellants for the offences punishable under Sections 302, 498A read with Section 34 of the IPC. The charge was read over and explained to the appellants wherein they pleaded not guilty and claimed to be tried. The prosecution, in order to prove the charges framed against the appellants, examined: (1) P.W.1,.Dr. Janvi Narayan Mishra, at Exh.13; (2) P.W.2, Executive Magistrate, A.S. Makwana, at Exh.19; (3) P.W.3, Bhimjibhai Jasmatbhai, (father of deceased Rekhaben) at Exh.22; (4) P.W.4, Panch, Hirjibhai Dahyabhai Chauhan, Exh.23; (5) P.W.5, Panch, Dipakbhai Chhotalal Pandya, at Exh.25: (6) P.W.6, Panch, Himmatbhai Nagjibhai Koli, at Exh.27; (7) P.W.7, Popatbhai Raghubhai Prajapati of panchanama of scene of

offence, at Exh.28; (8) P.W.8, Panch, Vittalbhai N. Chauhan, at Exh.35; (9) P.W.9, Anjuben Bhimjibhai, (mother of deceased Rekhaben) at Exh.36; (10) P.W.10, Dr. Kalpesh B. Shah, Medical Officer of Mansinhji Hospital, Palitana, at Ex.38; (11) P.W.11, Panch Habibali Sabaali, at Exh.40; (12) P.W.12, Kashiben Jadavbhai Gohil, at Exh.42; (13) P.W.13, Deputy Mamlatdar, Mehboobbhai Gudulabhai, who held inquest panchanama, at Exh.45; (14) P.W.14, PSI, K.T. Maru, at Exh.48; (15) P.W.15, Deputy Superintendent of Police, S.M. Katara, at Exh.51; (16) P.W.16, Senior PSI, M.G. Rabari, at Exh.53 and (17) P.W.17, Police Head Constable, Bhagwanbhai Chhaganbhai, of Bhavnagar City "A" Division Police Station. The prosecution had also produced documentary evidence such as invitation card of the marriage of the deceased Rekhaben and the appellant No.2 at Exh.12, inquest panchanama at Exh.15, post-mortem notes at Exh.17, yadi sent to the Executive Magistrate at Exh.20, dying declaration recorded by the Executive Magistrate at Exh.21, arrest panchanama of the appellants at Exh.26, panchanama of place of incident at Exh.29, complaint of deceased Rekhaben at Exh.50, report of FSL at Exh.55, etc. to prove the case against the appellants.

8. After the evidence of the prosecution was over, the appellants were questioned generally and their statements came to be recorded under Section 313 of the Code. The defence of the appellants was of general denial. No witness in defence was examined by the appellants.

9. The learned Additional Sessions Judge, on appreciation of oral as well as documentary evidence and the arguments advanced by the learned Additional Public Prosecutor and the learned advocate for the defence, held that the deceased Rekhaben had died a homicidal death. That all the appellants had common intention to commit murder of the deceased Rekhaben and as a result of their common intention, the appellants nos. 3 and 4 had caught hold of the deceased whereas the appellants Nos. 1 and 2 had poured kerosene on her and the appellant No.2 had set her ablaze. The burn injuries sustained by Rekhaben were sufficient in the ordinary course of nature to cause her death. It was held that the prosecution had failed to prove that the deceased Rekhaben was meted out with cruelty by the appellants. It was, further, held that the prosecution had failed to prove charge under Section 201 of the IPC against the appellants. On the basis of the abovereferred to conclusions, the learned Additional Sessions Judge has convicted the appellants for the offences punishable under Section 302 read with Section

34 and in the alternative under Section 302 read with Section 114 of the IPC and sentenced them to undergo R.I. for life, which has given rise to filing of the present appeal.

10. Learned counsel, Mr. Sunil C. Patel, for the appellants and learned APP, Mr. K.T. Dave, have taken us through the entire record and proceedings of Sessions Case No.60 of 1993. We have also minutely scrutinized and reappreciated the entire evidence led by the prosecution at the trial.

11. The learned advocate for the appellants has submitted that the history narrated by the deceased which was recorded in case papers Exh.39 was contrary to the yadi Exh.20, which only mentioned that Rekhaben who had sustained burn injuries was brought to Palitana Hospital and her condition was critical. It is submitted that in the said yadi Exh.20 the names of the appellants were not mentioned as assailants or persons who had set the deceased ablaze by pouring kerosene on her. The learned advocate for the appellants has further submitted that the dying declarations were made by the deceased as a result of tutoring by the parents because they had enough opportunity and time, when the deceased was taken to Palitana Hospital in a tempo. The learned advocate for the appellants has submitted that, in another dying declaration recorded by the Executive Magistrate, the specific role played by the accused No.2 was not mentioned by the deceased. The learned advocate for the appellants has further submitted that, if all the dying declarations made by the deceased are closely scrutinized, different stories have been narrated with regard to happening of the incident and individual role played by the each appellant and, therefore, the learned Sessions Judge has erred in placing reliance on the dying declarations. The learned advocate for the appellants has further submitted that the prosecution with oblique motive to suppress the genuineness of the incident had deliberately not examined the important witness such as the brother of the appellant No.2, Vashram, who had tried to extinguish fire by throwing mattress or quilt on the deceased. It is also submitted that the witnesses, who were residing in the neighbourhood, where the incident had taken place, were not examined though their statements were recorded by the Investigating Agency. The learned advocate for the appellants has next submitted that, according to the post-mortem notes Exh.17, vital parts of the body of the deceased were congested and, therefore, she could not have been able to speak and make statement in the nature of dying

declarations before the Doctor, before the Executive Magistrate and before the PSI, Mr. Maru. The learned advocate for the appellants has further submitted that on the clothes of the appellants, which were seized, no smell of kerosene or no particles of Hydro-carbons were detected by the FSL. Similarly, in the nails, which were taken from the hands of the appellants, no residue or particles of Hydro-carbons were detected in the report of the FSL.

11.1 The learned counsel for the appellants has strenuously urged that, in the case papers Exh.39, the person who had brought patient, Rekhaben, was mentioned as Jayrambhai, but, the said Jayrambhai was deliberately not examined by the prosecution with oblique motive, so that the real physical condition of the patient was not brought on record so as to consider the real mental status of the deceased. It is also submitted that, in the treatment chart annexed with the case papers Exh.39, name of Jayram was mentioned as a close relative of the patient. That, despite that fact, Jayrambhai was deliberately kept back and was not offered for examination during the trial. The learned counsel for the appellants, therefore, submitted that the prosecution had deliberately not examined the important witnesses so that the real truth can be brought on record about the mental and physical condition of the patient when she was admitted in the hospital

11.2 The learned counsel for the appellant, at the end, submitted that there were all the chances that the deceased was tutored by her parents when they were accompanying her before admission in the hospital and, therefore, the dying declarations are tutored one. It is also submitted that there was inconsistency in the dying declarations and they suffer from serious infirmities and unless there was corroborative evidence supporting the dying declarations, no conviction could have been recorded against the appellants. Therefore, the appeal be allowed and the conviction and sentence imposed on the appellants be quashed and set aside.

11.3 In support of the above submissions, the learned counsel for the appellants has placed reliance on the following decisions of the Supreme Court:

(i) In the case of Habeeb Mohammad vs. State of Hyderabad, reported in AIR 1954 SC p.51, wherein, it is held that it is the bounden duty of the prosecution to examine a material witness particularly when no allegation has been made that,

if produced, he would not speak the truth;

(ii) In the case of State of Gujarat vs. Mohan Bhai Raghbhai Patel and another, reported in AIR 1990 SC 1379, wherein, the Supreme Court, on the facts of that case, held that, when an accused had tried to extinguish the fire by throwing the mattress over the burning woman, it creates a doubt about the prosecution case that the accused had poured kerosene and set her on fire and it is further held that there was absence of motive on the part of the accused to do away with the deceased by pouring kerosene and setting her ablaze;

(iii) In the case of Smt. Kamla vs. State of Punjab, reported in AIR 1993 SC 374, wherein, the Supreme Court has laid down the principle that a dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declaration they should be consistent particularly in material particulars.

12. The learned Additional Public Prosecutor, on the other hand, has supported the findings recorded by the learned Additional Sessions Judge. The learned APP has submitted that the first dying declaration is in the nature of history narrated by the deceased herself recorded by P.W.10, K.B. Shah; the second dying declaration is in the nature of the complaint recorded by P.W.14, PSI, Maru; and the third dying declaration is recorded by the Executive Magistrate, Mr. Makwana. All the dying declarations were made by the deceased within a short period of sustaining burn injuries. It is submitted that there was no attempt on the part of the parents to tutor the deceased and the deceased who was on the verge of death would not falsely involve innocent persons. The learned APP has submitted that the deceased was harassed by the in-laws and she used to leave the matrimonial home frequently and had to take shelter in her parents' house. The learned APP has submitted that, whenever she had gone to the parents' house, she had complained about the ill-treatment meted out to her by her in-laws. The learned APP has submitted that there was motive on the part of the appellants to commit murder of the deceased and all the appellants had actively taken part in catching hold of the deceased, pouring kerosene on her and setting her ablaze and, thereafter, mercilessly leaving her in the engulfed flames. The conduct of the appellants was such that they had not even tried to save the life of the deceased. The learned APP has submitted that, if it was a case of suicide, the appellants would have certainly tried to extinguish the fire. It is submitted that, on the contrary, the

appellants, after seting the deceased on fire, had shown no mercy towards the deceased and they had left the house by closing the door. The learned APP has submitted that when the entire prosecution case was unfolded at the trial, the prosecution was not bound to examine all the witnesses whose statements came to be recorded during the investigation. The learned APP has submitted that the prosecution had examined all the material witnesses who had unfolded the case against the appellants and no adverse inference can be drawn for keeping back any witness at the trial. The learned APP has submitted that, when the Additional Public Prosecutor who had appeared in the trial before the Sessions Court, had filed closing purshis Exh.60 declaring that the prosecution case was closed, no objection was raised by the learned counsel appearing for the defence at the trial. The learned APP has submitted that if the witnesses were most material witnesses at the trial who could have thrown light on the occurrence of the incident, then, the learned counsel for the defence who had appeared at the trial, ought to have filed an application requesting the Sessions Court to examine those witnesses as court witnesses or could have examined them as defence witnesses. The learned APP has submitted that all the dying declarations recorded of the deceased were consistent and had satisfied all the necessary tests as laid down by the Supreme Court in a catena of decisions. Therefore, the learned Additional Sessions Judge has committed no error in placing reliance on the dying declarations in holding the appellants guilty of the charges framed against them. The learned APP has further submitted that the sequences in which the incident had taken place were most clinching evidence against the appellants because, on the assurance given by the brother of the appellant No.2, namely, Vashrambhai, and the Sarpanch of the village, Shri Monabhai, the deceased was sent reluctantly by her parents to the matrimonial home and, on the very next day, she was set on fire and done to death. It is, further, submitted that, whenever deceased had visited the house of her parents, she had always complained that her husband and other family members of in-laws staying in her matrimonial home, were causing harassment. The learned APP has, at the end, submitted that all the dying declarations of the deceased were consistent particularly in material particulars and, therefore, the appeal be dismissed and the conviction and sentence be confirmed. In support of the above submissions, the learned APP has invited our attention to the decision of the Supreme Court in the case of Habib Usman vs. State of Gujarat, reported in AIR 1979 SC 1181 wherein it is held that the

great weight must naturally and necessarily be attached to a dying declaration recorded very shortly after the occurrence and merely because some friends and relatives happened to be with the deceased before the statement was recorded, the statement cannot be thrown out as tutored.

13. The submission of the learned advocate for the appellants that the prosecution had deliberately withheld important witnesses, namely, Jayrambhai, who had brought the deceased to the hospital, the brother of the appellant No.2, Vashrambhai, and Sarpanch of village Valukad, Monabhai, and non-examination of the said witnesses at the trial by the prosecution had caused serious prejudice to the appellants which had resulted to denial of opportunity to them to cross examine the said witnesses, deserves to be rejected. When Dr. K.B. Shah had deposed that when he examined the deceased at the time of admission in the hospital, he had found that the deceased was in a fit state of mind to narrate the history of the incident, it was not at all necessary to examine the person named Jayrambhai whose name was mentioned in the case papers at Exh.39. The Doctor before whom the history was narrated was the most competent and qualified person to depose about the mental/physical condition of the deceased at the time of admission in the hospital and to ascertain about the fitness of the victim to make statement. When a qualified Doctor was examined, it was not necessary for the prosecution to examine said Jayrambhai. The submission that the brother of the appellant No.2, Vashrambhai, was also not examined, also deserves no merit. When the prosecution case was unfolded at the trial by examining the relevant witnesses, it was not at all necessary to examine Vashrambhai who would have only repeated the evidence led by the prosecution. By examining Vashrambhai, it would have been only duplication of the evidence led through the parents of the deceased, because, Vashrambhai, after the incident, had gone to call the parents of the deceased at village Valukad. The deceased herself, in her dying declarations, had stated that Vashrambhai had tried to extinguish the fire by throwing mattress at her. When these facts were brought on record, it was not at all necessary for the prosecution to examine Vashrambhai who is the brother of the appellant No.2. Taking into consideration totality of all the circumstances and the evidence led by the prosecution at the trial, and when the salient features about happening of the incident were unfolded before the Sessions Court, we are of the view that it was not necessary for the prosecution to examine witness after witness so as to burden the record of the

case. By not examining witnesses as argued by the learned advocate for the appellants, no prejudice was caused to the appellants.

14. Law on the question of dying declaration is well settled that a dying declaration can form the sole basis for conviction without any corroboration if the same is true and correct version of a dying man and is not stated to have been made under any doubtful circumstances. It was like any other prosecution evidence and subject to close scrutiny. Corroboration was not sought for because it was a weak piece of evidence, but corroboration was sought for because it suffers from certain infirmity. It is, therefore, necessary to find out whether there are any infirmities in the three dying declarations, viz. the first dying declaration of the deceased recorded in the nature of history narrated by her to P.W.10. Dr. Shah, the second dying declaration which is the complaint lodged by the deceased before P.W.14,PSI, K.T. Maru, and the third dying declaration recorded by P.W.2, Executive Magistrate, Mr.A.S. Makwana.

15. In the first dying declaration, which was recorded by P.W.10, Dr. Shah, the deceased had made statement in the form of history narrated by herself. She had declared before the Doctor that:
"Mother-in-law and sister-in-law had caught hold of her and father-in-law and husband had set her on fire."
In the second dying declaration, which is the complaint lodged by the deceased before P.W.14,PSI, K.T. Maru, it was stated by the deceased that:
"Her mother-in-law and sister-in-law had caught hold of her and her husband had poured kerosene from a primus on her dead, that her father-in-law had also caught hold of her and, thereafter, her husband, after pouring kerosene, had lighted a match-stick and set her on fire. Her father-in-law, mother-in-law, sister-in-law and husband, after setting her on fire, and after closing the door, had left the house and that when she had raised shouts, her brother-in-law, Vashrambhai, had rushed and thrown a quilt like substance at her and had extinguished the fire. In the meantime, her parents had arrived there and had taken her to Palitana Government Hospital in a three wheeler tempo."
In the third dying declaration recorded by P.W.2, Executive Magistrate, Mr.A.S. Makwana, she had stated as under:
"Her husband, Maganbhai, mother-in-law, Jamnabai, father-in-law and sister-in-law Kaliben, had set her on fire. There were domestic quarrels in her matrimonial home. Her husband had opened knob of the primus and had

poured kerosene on her and after lighting a match-stick, had set her ablaze. They left her in the house by closing the door. That, the house had two doors (exits) and through the second door (exit) she had come out in a burning condition and when she had raised shouts, her brother-in-law, Vashrambhai, had rushed and had thrown cotton quilt on her and tried to extinguish the fire. Her father was informed at village Valukad about the incident and she was removed in a tempo by her father to the hospital. She was admitted in the hospital and was under treatment."

16. The learned advocate for the appellants, Mr. Patel, has strenuously urged that the above three dying declarations of the deceased were inconsistent in as much as no specific role played by each accused was stated in the above dying declarations. It is submitted that in the first dying declaration which was the history narrated by her before Dr. Shah, he had stated that 'mother-in-law and sister-in-law had caught hold of her and father-in-law and husband had set her on fire.' It is submitted that in the second dying declaration in the form of complaint, it was stated by the deceased that, 'her mother-in-law and sister-in-law had caught hold of her and her husband had poured kerosene from a primus on her head, that her father-in-law had also caught hold of her and, thereafter, her husband, after pouring kerosene, had lighted a match-stick and set her on fire.' It is, further, submitted by the learned advocate for the appellants that in the third dying declaration recorded by the Executive Magistrate, the role played by each appellant was inconsistent as in the said dying declaration the deceased had stated that all the four appellants had set her on fire. In the said dying declaration, she had not stated that she was caught hold of by any of the appellants. In view of the inconsistency with regard to the role played by each appellant, the learned advocate for the appellants has submitted that benefit of reasonable doubt should be given in favour of appellants Nos. 1, 3 and 4, as the above three dying declarations were inconsistent with regard to the role played by appellants Nos. 1, 3 and 4. In support of the above submission, the learned counsel for the appellant has placed reliance on the decision of Smt. Kamla [AIR 1993 SC 374] (supra). The Supreme Court, in the above decision, has held as under:

"A dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declaration they should be consistent particularly in material particulars."

(emphasis supplied)

It is settled legal principle propounded by the Supreme Court in a catena of decisions that dying declaration requires a close scrutiny if it is to be made the sole basis for conviction. Therefore, on a close scrutiny of the three dying declarations one by one minutely, we find that the role played by the appellants Nos.1,3, and 4 indicated in the dying declarations as stated above is inconsistent with regard to material particulars, namely, the role played by each appellant in catching hold of the deceased and setting her on fire. The conscious of the Court is required to be satisfied having regard to the veracity of the dying declaration which is made the sole basis for conviction. We find that there are glaring inconsistencies with regard to the role played by the the appellants Nos.1,3, and 4 narrated by the deceased in the above three dying declarations and the deceased had tried to improve the story about the appellants Nos.1, 3, and 4 catching hold of her. However, all the dying declarations are consistent with regard to the role played by the appellant No.2 (husband of the deceased), who had poured kerosene from the primus on the deceased and set her ablaze. Therefore, we are of the view that all the three dying declarations are consistent so far as the role played by the appellant No.2 in pouring kerosene on the deceased and setting her ablaze, is concerned. Therefore, the conviction of the appellant No.2, Maganbhai Govindbhai Koli, under Section 302 of the IPC, deserves to be confirmed. However, in view of inconsistencies as found in the above three dying declarations with regard to role played by the appellants Nos.1, 3 and 4, we are of the view that benefit of reasonable doubt should be given to the appellants nos. 1, 3 and 4, and they are required to be acquitted of the offences punishable under Section 302 read with 34 and in the alternative Section 302 read with Section 114 of the IPC.

17. As a result of foregoing discussion, the appeal is partly allowed. The conviction of appellant No.2, Maganbhai Govindbhai Koli, under Section 302 of the Indian Penal Code, and the sentence imposed on him to undergo R.I. for life, recorded by the learned Additional Sessions Judge, Bhavnagar, vide judgment and order dated June 29, 1993, in Sessions Case No.60 of 1993, is hereby confirmed.

17.1 The conviction of appellant No.1, Govindbhai Shambhubhai, appellant No.3, Jamnaben Hirabhai wife of Govindbhai Shambhubhai and appellant No.4, Kaliben Govindbhai, under Section 302 read with 34 and in the alternative Section 302 read with Section 114 of the

Indian Penal Code, and the sentence imposed on them to undergo R.I.for life, recorded by the learned Additional Sessions Judge, Bhavnagar, vide judgment and order dated June 29, 1993, in Sessions Case No.60 of 1993, is quashed and set aside by giving them benefit of reasonable doubt. They are acquitted of the offences punishable under Section 302 read with 34 and in the alternative Section 302 read with Section 114 of the Indian Penal Code. Appellants Nos.1, 3 and 4 are on bail and their bail bonds shall stand cancelled. Muddamal be destroyed in terms of the directions given by the learned Additional Sessions Judge, Bhavnagar, in the impugned judgment and order.

18. In view of the judgment and order dated June 19, 2003, rendered in Criminal Appeal No.815 of 1993, Criminal Misc. Application No 7862 of 2000 and Criminal Misc. Application No.822 of 2002 do not survive and are disposed of accordingly. Notice is discharged.

June 19, 2003 (M.H. Kadri, J.)

(H.H.Mehta, J.)
(swamy)